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No. 02-1464

In The Supreme Court of the United States

GEORGE E. SNYDER, WARDEN,

Petitioner,

v.

MARIO ROSALES-GARCIA,

Respondent.

RANDY J. DAVIS, WARDEN, AND BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT,

Petitioners,

v.

REYNERO ARTEAGA CARBALLO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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OPINIONS BELOW

The consolidated en banc opinion of the court of appeals (Pet. App. 1a-64a) is reported at 322 F.3d 386. The orders of the district courts are unreported.

JURISDICTION

The Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTES INVOLVED

In addition to the provisions referred to in the petition for certiorari and reprinted in petitioners' appendix, this case also implicates Sections 303 and 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, and former 8 U.S.C. 1226(e) (1994). Portions of these provisions are set forth in an appendix to this brief.

STATEMENT

Respondents are in general agreement with the statement of petitioners and emphasize only the following additional points.

1. Respondents are Mariel Cubans who were ordered excluded prior to IIRIRA's enactment. Because Cuba will not accept their return, the Immigration and Naturalization Service (INS) has detained both respondents for lengthy periods: Rosales for four years and Carballo for nearly fifteen.

Neither respondent is currently detained. The government has voluntarily released each respondent from immigration detention pursuant to the Cuban Review Plan, 8 C.F.R. 212.12. Rosales was released on immigration parole in May 2001 following completion of a halfway-house placement. Pet. Br. 7. He lives in Miami and has been working and otherwise complying with the conditions of his parole. Carballo was released on immigration parole to a residential drug-treatment program in December 2002. He is scheduled to complete that program in September 2003. Pet. Br. 11-12.[1]

2. Prior to IIRIRA, "deportation" proceedings governed cases involving aliens who effectuated a lawful or unlawful entry into the United States, while "exclusion" proceedings governed cases involving aliens who were stopped at the border. IIRIRA replaced that bifurcated system with a unitary "removal" process that applies to both "inadmissible" and "deportable" aliens. The category of "inadmissible" aliens under IIRIRA is broader than the previous category of "excludable" aliens because the term "inadmissible" encompasses aliens who have been stopped at the border as well as aliens who have entered the country unlawfully (and would previously have been deemed "deportable").

IIRIRA created a new provision, 8 U.S.C. 1231, that governs the post-final-order detention of all aliens ordered

[1] The government contends that Carballo "developed a sizable disciplinary record" during his immigration incarceration. Pet. Br. 11. The record reflects that Carballo has not been involved in any incident involving violence or threats of violence in nearly ten years. C.A. Gov't Supp. Docs. re Carballo at 23.

removed, whether inadmissible or deportable. Section 1231(a)(1) establishes a 90-day "removal period." Section 1231(a)(6) authorizes detention "beyond the removal period" for aliens who are inadmissible for any reason; are deportable on specified grounds; or pose a danger to the community or a risk of flight.[2] Section 1231 replaced the prior provisions, including 8 U.S.C. 1226(e) (1994), that governed post-final-order detention before IIRIRA.

3. In *Zadvydas v. Davis*, the Court construed Section 1231(a)(6) as "not permit[ting] indefinite detention" of two former legal residents who were ordered deported but could not be removed. 533 U.S. 678, 689 (2001). The Court found that the indefinite detention of such aliens would present a "serious constitutional problem." *Id.* at 690. Finding that the statute could reasonably be construed to avoid constitutional concerns, the Court held that Section 1231(a)(6) should be read as "limit[ing] an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States." *Id.* at 689. The dissenters criticized the Court's statutory ruling, stating that it would necessarily apply equally to inadmissible aliens (such as Mariel Cubans) who were apprehended before entering the United States,

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[2] 8 U.S.C. 1231(a)(6) provides:

> Inadmissible or criminal aliens. An alien ordered removed who is inadmissible under [8 U.S.C. 1182], removable under [8 U.S.C. 1227(a)(1)(C), (a)(2), or (a)(4)] or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

because the operative language of Section 1231 does not differentiate between categories of aliens. 533 U.S. at 710 (Kennedy, J., dissenting) ("[I]t is not a plausible construction of § 1231(a)(6) to imply a time limit as to one class but not to another. The text does not admit of this possibility."); *id.* at 717 (describing release of Mariel Cubans as "a necessary consequence of the majority's construction of the statute"); *cf. id.* at 705 (Scalia, J., dissenting) ("[Congress] provided the authority to detain both groups in the very same statutory provision"). Since *Zadvydas*, Congress has not amended Section 1231(a)(6).

The Attorney General implemented *Zadvydas* with regulations that apply the ruling to all deportable aliens and to some inadmissible aliens. Specifically, the regulations provide that inadmissible aliens who have entered the country unlawfully are governed by the *Zadvydas* construction of Section 1231(a)(6) but that inadmissible aliens who are apprehended at the border are not. *See* 8 C.F.R. 241.13(a), (b)(3)(i).

4. The Sixth Circuit's en banc decision addressed several issues in ultimately holding that *Zadvydas*'s construction of Section 1231(a)(6) applies to both deportable and inadmissible aliens. The court first rejected the government's argument that Rosales's release on parole rendered his case moot. The court reasoned that his parole could be revoked at any time and that he therefore continues to have a stake in the outcome of the case. Pet. App. 13a-14a. In relation to Carballo, the court noted that the government itself conceded that his placement into a residential drug-treatment program did not moot his case. Pet. App. 17a n.10. The court further held that Carballo's habeas petition should not be dismissed as an impermissible successive petition. Pet. App. 22a-23a.

The court next considered the government's argument that respondents' detention is governed *not* by Section 1231(a)(6), but rather by former Section 1226(e) (1994) as it existed prior to IIRIRA, because respondents were ordered excluded under pre-IIRIRA law. Pet. App. 23a-28a. The court initially explained that this issue was not resolved by *Zadvydas*. Pet. App. 25a ("Inasmuch as the Supreme Court in *Zadvydas* did not discuss the application of IIRIRA to Zadvydas, we cannot simply assume that such application is appropriate for all aliens deported or excluded before April 1, 1997."). The court then concluded that application of Section 1231(a)(6) to respondents did not implicate principles of retroactivity because respondents are challenging the government's current authority to detain them. Pet. App. 26a. After determining that the issue turned on "IIRIRA's general applicability," the court considered IIRIRA's effective-date provision, Section 309(c)(1), as construed by this Court in *INS v. St. Cyr*, 533 U.S. 289, 318 (2001), and found that the provision supports the application of Section 1231(a)(6) to these respondents. Pet. App. 26a-27a.

Having resolved these threshold issues, the court turned to the question of whether *Zadvydas*'s construction of Section 1231(a)(6) applies to inadmissible aliens like respondents, or only to deportable aliens as the government argued. Pet. App. 31a-38a. The court held that the statute imposes the same limit on detention for both groups and set forth two independent grounds for its statutory holding. First, the court of appeals held that the plain language of Section 1231(a)(6) (wholly apart from any constitutional concerns) does not permit a different construction of the statute for different categories of aliens. Pet. App. 37a. In reaching that conclusion, the

court agreed with the only other circuit to have addressed the issue at that time. *See* Pet. App. 37a (citing *Lin Guo Xi v. INS*, 298 F.3d 832, 836 (9th Cir. 2002)).[3]

The court then noted that its statutory holding was also supported by the principle of constitutional avoidance. The court did not decide whether respondents' indefinite detention would be unconstitutional, but it expressed the view that such detention would raise serious constitutional concerns, Pet. App. 47a, and explained why it believed that those concerns were not resolved by *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). The court emphasized that aliens apprehended at the border are not entirely outside the protections of the Due Process Clause (as reflected in the circuit courts' recognition that the government could not subject such aliens to torture or summary execution). Pet. App. 42a & n.29. The court further explained that conditional release of such aliens from detention does not establish a constitutional right to entry any more than release of the aliens in *Zadvydas* establishes a "constitutional right to stay." Pet. App. 46a. Based on these considerations and its assessment of *Mezei*, the court concluded that the doctrine of constitutional avoidance supported the statutory holding it had already reached on pure textual grounds.

5. Subsequent to the court of appeals' ruling, and the government's petition, this Court decided *Demore v. Kim*, __ U.S. __, 123 S. Ct. 1708 (2003). That decision upheld the

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[3] After the Sixth Circuit's decision, a divided panel of the Eighth Circuit held that *Zadvydas*'s limiting construction of Section 1231(a)(6) does not apply to inadmissible aliens stopped at the border. *Borrero v. Aljets*, 325 F.3d 1003 (8th Cir. 2003). *See infra* point 2.

constitutionality of 8 U.S.C. 1226(c), a different statute that imposes mandatory immigration detention pending removal proceedings for aliens who have been convicted of certain crimes.

REASONS FOR DENYING THE WRIT

The government seeks review of two questions. Even if either question warranted review, which respondents dispute, certiorari should be denied because this case is an inappropriate vehicle for considering those issues in light of two threshold questions presented by respondents' cases. First, as the government argued below, respondents' cases require resolution of a complex predicate question, namely whether Section 1231(a)(6) applies to these respondents at all. Second, the question of mootness is at issue for both respondents because the government has released Rosales and Carballo from immigration detention and Carballo will have completed his residential treatment program by the time the Court would hear this case. Other pending cases directly raise the issues the petition presents without the impediments at issue here.

Even in the absence of these impediments, review is not warranted because the shallow circuit split that currently exists may disappear; because the practical effect of the court of appeals' statutory ruling is not sufficiently pressing to require the Court's immediate attention (as evidenced by the government's decision not to seek review of the Ninth Circuit's earlier identical statutory ruling); because the court of appeals' "belie[f]," Pet. Br. (I), that this Court implicitly overruled *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), is not a judgment

and has no consequence for the outcome of the case; and because the court of appeals' ruling flows ineluctably from this Court's construction of the very same provision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), a provision that Congress has not amended or modified since that ruling.

1. This case is not a proper vehicle for considering the questions raised by the government because respondents' cases raise two threshold questions, both of which must be addressed and either one of which could preclude the Court from reaching the questions presented. In contrast to this case, other cases already decided or currently pending in the courts of appeals do not present either of these predicate issues and therefore constitute more appropriate vehicles. *See infra* note 8 (listing cases).

a. First, the question of whether Section 1231(a)(6) limits the detention of inadmissable aliens apprehended at the border is presented by this case only if the Court first determines that Section 1231(a)(6) applies to these respondents at all. That was an intensely contested issue before the court of appeals. The government vigorously argued that current Section 1231(a)(6) is altogether inapplicable to respondents because they were issued final orders of exclusion *before* IIRIRA was enacted. In the government's view, Section 1231(a)(6) applies only to aliens whose immigration removal proceedings were commenced *after* IIRIRA's 1997 effective date (with the exception of certain aliens subject to IIRIRA's special "transition period custody rules," IIRIRA § 303(b)(3)). Thus, according to the government, respondents' detention is governed solely by the pre-IIRIRA detention statutes, including 8 U.S.C. 1226(e) (1994). *See* C.A. Gov't Supp. Br. re Rosales at 23-36. Respondents in turn assert that their detention is governed by Section 1231(a)(6) because

IIRIRA did not preserve the prior detention regime for aliens subject to post-final-order detention after IIRIRA's effective date. *See* C.A. Rosales Supp. Reply Br. at 9-17.

The court of appeals examined the web of pre- and post-IIRIRA detention and effective-date provisions and grappled with the threshold question of which detention statute governs respondents' cases. Pet. App. 23a-28a. Though recognizing that the issue was not free from doubt, Pet. App. 23a ("[t]here are two versions of the Immigration and Nationality Act . . . that could potentially apply"), the court of appeals agreed with respondents. It held that their detention is governed *not* by Section 1226(e) (1994), but by Section 1231(a)(6), the same statute that this Court construed in *Zadvydas*. Pet. App. 27a-28a. As the court's decision reflects, the question of whether respondents' detention is governed by Section 1231(a)(6) or by pre-IIRIRA statutes must be resolved before this case properly presents the question of "[w]hether the six-month rule of *Zadvydas* [interpreting Section 1231(a)(6)] applies to respondents," Pet. Br. (I) (Questions Presented).

The government seeks to avoid this threshold inquiry, which it considered dispositive in the court of appeals, by asking the Court to disregard it. Specifically, the government advises the Court that it "does not seek further review" of whether respondents' detention is governed by 8 U.S.C. 1226(e) (1994) or Section 1231(a)(6). Pet. Br. 19 n.4. The government's litigation decision cannot, however, resolve the question of which statute Congress intended to

govern respondents' detention.[4] Thus, were the Court to grant review of this case, it would need to consider and resolve that predicate question, thereby adding substantially and unnecessarily to the complexity of the issues presented.

Indeed, the government continues to argue in other cases the very issue it seeks to avoid here. In a brief filed in the Third Circuit on May 9, 2003 (after the filing of the petition in this case), the government devotes ten pages to arguing (as it did below) that Section 1231(a)(6) does *not* apply to "excludable" aliens whose immigration proceedings commenced before IIRIRA's effective date. Specifically, the government contends that Section 1231(a)(6) is not applicable to the excludable Mariel Cuban alien in that Third Circuit case because (like respondents here) his "exclusion proceedings commenced before April 1, 1997."[5]

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[4] *See, e.g., Garcia v. United States*, 469 U.S. 70, 79 (1984) ("It is our responsibility to interpret the intent of Congress in enacting [the statute at issue], irrespective of petitioners' or respondent's prior or present views."); *see also Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 622 (1996) (opinion of Breyer, J.) ("the proper understanding of matters of law cannot be left merely to the stipulation of parties" (punctuation and citation omitted)).

[5] Brief of Appellees at 23, *Sierra v. Romaine* (3d Cir.) (No. 02-2826). Point III of the government's brief is entitled, "Sierra's Detention is Governed by Former 8 U.S.C. §§ 1226(e), 1225(b), 1227(a), and 1182(d)(5)(A) (1994) and Not By Current § 1231(a)(6)." *See id.* at 20-29; *see also id.* at 24 ("Because Sierra was ordered excluded in 1992, the new Section 1231(a)(6) does not apply, and Sierra's detention is governed by the pre-IIRIRA statutes defining the Attorney General's detention and parole authority."). *See also* Brief of Appellees [United States] at 22-23, *Suarez-Tejeda v. United States* (10th Cir.) (No. 02-6341) (brief filed May 21, 2003, asserting that "Suarez-Tejeda incorrectly assumes that 8 U.S.C. § 1231(a)(6) applies to his case. . . . [B]ecause he was ordered excluded in immigration proceedings that commenced before April 1,

(Continued on following page)

That is precisely the argument the government seeks to abandon in this case in order to avoid a threshold issue that presents an obvious obstacle to its request for review. If the Court were simply to disregard that issue as the government urges, the Court would risk issuing an opinion on the proper construction (and possibly the constitutionality) of a statute in a case where the provision may not in fact be applicable at all.[6]

More significantly, the presence of this threshold question may result in the Court determining that respondents' detention is *not* governed by Section 1231(a)(6), but rather by *pre*-IIRIRA law. If Section 1231(a)(6) does not apply at all, the Court would never reach the issue presented by the petition for certiorari. Instead, the Court would be presented solely with a question of no enduring significance, namely whether the *prior* statute, which Congress has long since replaced, authorizes indefinite detention of aliens placed in immigration proceedings before IIRIRA became effective. The resolution of that question would determine post-final-order detention authority for only a closed set of immigration cases that were commenced before 1997.

1997, his detention is governed by the pre-IIRIRA statute, including 8 U.S.C. § 1226(e) (1994).").

[6] In *Zadvydas*, the Court applied Section 1231(a)(6) to two aliens without explaining why the current statute applied to their cases. *See* Pet. App. at 24a. Significantly, however, in *Zadvydas* the respondent in No. 00-38 was subject to a *post*-1997 removal order and his detention was therefore indisputably governed by Section 1231(a)(6). *See* 533 U.S. at 685. Furthermore, in *Zadvydas*, there was no issue between the parties as to which statute applied, whereas in this case the question has been actively contested.

Moreover, if the Court were to construe the pre-IIRIRA statute as authorizing indefinite detention, it would then need to confront whether that now-repealed statute violated due process. The axiom that resolution of constitutional questions should be avoided where possible has particular force under these circumstances, where the constitutional question would be triggered by a superceded statute of limited application.

b. This case also raises a substantial question of mootness that the Court would need to resolve before reaching the merits. As the government points out, both respondents have been released from immigration detention pursuant to the normal application of the parole approval process for Mariel Cubans. Pet. Br. 7, 11-12.

The government has consistently argued that Rosales's release on parole renders his case moot, a position rejected by the court of appeals. Pet. App. 11a-17a; *see also* C.A. Gov't Pet. for Reh'g re Rosales at 4-5, 6-8 (arguing that Rosales's then-anticipated release to a halfway house would moot his appeal). With respect to Carballo, the government concedes only that his present release to a residential drug-treatment program does not moot his case. Pet. App. 17a n.11; *see also* C.A. Gov't Status Report re Carballo (Jan. 15, 2003) ("Because Mr. Carballo's pro se habeas petition arguably challenges the Attorney General's authority to restrain his liberty through placement in a halfway house, . . . it appears Mr. Carballo's case remains a live controversy."). Thus, assuming Carballo successfully completes the drug-treatment program in September, his case will present the same mootness issue raised by Rosales by the time the Court would hear this case. The government does not dispute that Carballo's release will require the Court to address this threshold mootness issue. *See* Pet. Br. 29 n.8. It argues only that the

possibility of mootness should not dissuade the Court from granting review.[7]

Numerous other cases pending in or recently decided by the courts of appeals would directly raise the questions the government presents here without the vehicle problems of this case. In these other cases, the aliens were subjected to immigration proceedings *after* IIRIRA's effective date and either remain in detention or have been released only by virtue of the judicial order being challenged. Therefore, their detention is indisputably governed by Section 1231(a)(6), and they present no issue of mootness.[8] Accordingly, if the Court deems the government's

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[7] The government suggests that "the lower courts would benefit" from the Court's consideration of the mootness issue "if it is necessary to address the issue in this case." Pet. Br. 29 n.8. It does not, however, urge that the mootness issue independently warrants review. The two cases cited by the government, Pet. Br. 29 n.8, simply concern fact-specific applications of the mootness doctrine. *See Riley v. INS*, 310 F.3d 1253, 1257 (10th Cir. 2002) (acknowledging "voluntary cessation" exception to the mootness doctrine but finding that record "provide[d] inadequate development and support of this issue"); *Picrin-Peron v. Rison*, 930 F.2d 773, 776 (9th Cir. 1991) (finding mootness based on sworn INS affidavit that absent specified occurrences petitioner would not be redetained for at least one year).

The government further asserts that if the case were deemed moot, vacatur under *United States v. Munsingwear*, 340 U.S. 36 (1950), would be appropriate. The application of *Munsingwear* to this case is doubtful given that the respondents' release was due to the government's own voluntary action. *See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24-25 (1994) (vacatur generally not appropriate when "party seeking relief from the judgment below caused the mootness by voluntary action").

[8] For example, *Borrero v. Aljets*, 325 F.3d 1003 (8th Cir. 2003), discussed *infra* point 2, does not raise any of the threshold impediments presented by respondents' cases because Borrero was placed in immigration proceedings *after* 1997, is indisputably governed by Section

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questions worthy of review, it will have ample opportunity to grant review in a case that does not contain the thorny antecedent issues presented here.[9]

2. The applicability of the Section 1231(a)(6) limit on detention to inadmissible aliens stopped at the border is a question of statutory construction as to which there is at most a shallow split among the circuits that warrants further percolation in the courts of appeals. At the time of the government's petition, the only two circuits to have squarely addressed the question agreed that, based on the language of the statute, Section 1231(a)(6) could not be

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1231(a)(6), and was released from detention only because of the district court's order. In each of the following pending cases the alien is likewise inadmissible based on a *post*-1997 removal order and was released from detention only as a result of a judicial order: *Tamayo-Gonzalez v. Jenifer*, No. 02-1372 (6th Cir.); *Ferrin Garcia v. INS*, No. 03-15055 (9th Cir.); *Goirino-Aguilar v. INS*, No. 03-15165 (9th Cir.); *Gonzalez-Munoz v. Smith*, No. 03-35039 (9th Cir.); *Menendez-Reinos v. INS*, No. 03-15486 (9th Cir.); *Pedroso v. INS*, No. 02-17534 (9th Cir.); *Ravelo Barrientos v. Smith*, No. 03-35043 (9th Cir.); *Suarez Martinez v. Smith*, No. 03-35053 (9th Cir.). Even as to the issue of whether aliens with pre-1997 exclusion orders are governed by Section 1231(a)(6), other cases present that issue without the questions of mootness that this case contains. *See, e.g., Sierra v. Romaine*, No. 02-2826 (3d Cir.). The government has requested that most of these pending appeals be held in abeyance until the Court rules on the petition in this case.

[9] The petition of respondent Carballo also raises an additional question, resolved by the court of appeals, that may complicate the Court's consideration of his claim. In the court of appeals, the government unsuccessfully argued that Carballo's claim is barred because his successive habeas petition constituted an "abuse of the writ." Pet. App. 17a ("The government argues on appeal that 'Carballo's petition is an abuse of the writ [of habeas corpus] because it is a second, successive petition that raises the same claims that were denied on the merits in his first petition. . . .'") (alteration in original). The government's petition notes but does not address this issue. Pet. Br. 14.

interpreted differently for deportable and inadmissible aliens. Like the court of appeals here, the Ninth Circuit ruled, in August 2002, that as a pure textual matter Section 1231(a)(6) does not distinguish between deportable and inadmissible aliens subject to post-final-order detention and that the statute therefore imposes the same presumptive detention limit with respect to both groups. *See Lin Guo Xi v. INS*, 298 F.3d 832, 835-37 (9th Cir. 2002).

The government argues that the decisions of the Sixth and Ninth Circuits conflict with a two-paragraph, per curiam summary disposition of the Fifth Circuit in a pro se case that was initially issued as an unpublished order. Pet. Br. 19 (citing *Rios v. INS*, 324 F.3d 296 (5th Cir. 2003) (per curiam)). That decision does not create even an arguable circuit conflict because the Fifth Circuit did not address or decide the question of statutory construction that the Sixth and Ninth Circuits adjudicated and that the government raises here. *Rios* addressed only a *constitutional* challenge to detention by an inadmissible alien stopped at the border who argued that "his continued detention violates his due process rights." *Rios*, 324 F.3d at 297. The Fifth Circuit rejected the constitutional claim and never addressed the statutory question at issue here.[10]

[10] The other case the government cites, *Sierra v. INS*, 258 F.3d 1213 (10th Cir.), *cert. denied*, 534 U.S. 1071 (2001), Pet. Br. 20, also does not create a circuit split. *Sierra* concerned a challenge to parole procedures under the Mariel Cuban regulations. *See* 258 F.3d at 1218. The court did not address the statutory question of whether Section 1231(a)(6) imposes any limit on the length of detention of an inadmissible alien.

After the government filed its certiorari petition, a divided panel of the Eighth Circuit held that Section 1231(a)(6) does not impose a presumptive six-month limit on the post-final-order detention of inadmissible aliens stopped at the border. *Borrero v. Aljets*, 325 F.3d 1003 (8th Cir. 2003). The majority held that the construction of Section 1231(a)(6) adopted in *Zadvydas* "is inapplicable to inadmissible aliens." *Id.* at 1007. The dissent noted that "two circuits and the district court in the matter before us have agreed with Justices Kennedy's and Scalia's position: there is no credible distinction to be made between the rights conferred to removable and inadmissible aliens in § 1231(a)(6)." *Id.* at 1009 (Heaney, J., dissenting).

The panel decision in *Borrero* is subject to further consideration by the Eighth Circuit. Respondents' counsel has been informed that Borrero will file a petition for rehearing en banc on or before May 30, 2003. If the Eighth Circuit denies rehearing or affirms the panel decision, there will be a narrow split among three circuits. Alternatively, if the en banc Eighth Circuit agrees with the Sixth and Ninth Circuits that Section 1231(a)(6) imposes a limit on the detention of inadmissible aliens, then all of the courts of appeals to consider the statutory question will be in agreement. In either event, it is premature to grant review on the basis of a circuit split before the issue has matured in the courts of appeals.

3. a. The government also argues that, even in the absence of a conflict, this case warrants review because of the importance of the issue. Yet despite its claim that the Sixth Circuit's statutory decision is of pressing "practical importance," Pet. Br. 18, the government chose *not* to seek review of the Ninth Circuit's earlier ruling in *Lin Guo Xi*, although the statutory holding in that case was identical

to the Sixth Circuit's ruling in this case.[11] The government does not suggest that the practical significance of this case (applicable to fifty-one current detainees, Pet. Br. 27) is any greater than the ruling in *Lin Guo Xi*. Nor could it do so, given the vast border and far larger geographic area covered by the Ninth Circuit's ruling. The fact that for nearly a year aliens governed by *Lin Guo Xi* have been entitled to conditional release throughout the nine states of the Ninth Circuit, and that the government sought no further review of that case, belies its assertion that the Sixth Circuit's ruling "presents an immediate threat to public safety," Pet. Br. 28, that compels review even in the absence of a mature split among the courts of appeals.

Making the same argument that the Court rejected in *Zadvydas*, the government again states that the court of appeals' decision "require[s] the release into the United States of dangerous aliens," Pet. Br. 26-27. As this Court recognized, an alien's removable status does not render him a greater danger than a similarly situated citizen who has been released after serving his criminal sentence. *Zadvydas*, 533 U.S. at 692 ("alien's removable status ... bears no relation to a detainee's dangerousness"). The government does not claim that, as a group, the inadmissible aliens covered by the Sixth Circuit's ruling are more dangerous than the aliens at issue in *Zadvydas*. In addition, release under Section 1231(a)(6) does not entitle an alien to an absolute right to be at large. *Id.* at 696. It only authorizes

[11] The government unsuccessfully sought en banc review of the Ninth Circuit decision, and obtained two extensions for seeking certiorari, but did not request review of the case, which raised neither of the vehicle problems at issue here.

release under "conditions that may not be violated." *Id.* Individuals who violate these conditions are subject to reincarceration under 8 U.S.C. 1253. *Id.* The government, moreover, does not suggest that either of the respondents in this case, whom the government has already voluntarily released, poses a danger that requires continued detention. Indeed, the government did not seek a stay of the court of appeals' ruling in this case.

Nor does the Sixth Circuit's decision carry greater implications for national security than *Zadvydas*. In *Zadvydas*, this Court emphasized that it was not considering "terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security." *Id.* at 696. Similarly, the Sixth Circuit emphasized that the instant cases present "no special circumstances involving national security," and it acknowledged that such circumstances might warrant a different analysis. Pet. App. 50a. And, subsequent to *Zadvydas* and September 11, Congress enacted a statute that expressly authorizes additional post-final-order detention of aliens whose release "will threaten . . . national security." USA PATRIOT Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001), Pub. L. No. 107-56, § 412(a), 115 Stat. 272 (codified at 8 U.S.C. 1226a).[12] The court of appeals' decision has no effect on that statute.

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[12] 8 U.S.C. 1226a(a)(6) provides:

> An alien detained solely under paragraph (1) [requiring detention of aliens certified as suspected terrorists or threats to national security] who has not been removed under [8

(Continued on following page)

The government also maintains that this case involves unique sovereignty concerns not present in *Zadvydas*, contending that the ruling implicates the government's "interest in preventing the aliens' unlawful physical presence in the United States *in the first place*." Pet. Br. 24 (emphasis in original). This argument fails to acknowledge that the government is already applying *Zadvydas*'s release requirement to *inadmissible* aliens who have no right to be in the country *"in the first place"* – namely those who entered the country unlawfully. *See* 8 C.F.R. 241.13; *see also supra* p. 4; Pet. App. 36a n.26. The government's recognition that these inadmissible aliens are governed by *Zadvydas* casts doubt on its assertion that following the same rule in this case poses a unique threat.[13]

b. The government's second question is plainly not appropriate for the Court's consideration. It seeks review not of the court's judgment or even of the result the court reached; rather it asks this Court to decide whether the Sixth Circuit erred in "believ[ing]" that this Court has "implicitly overruled" *Mezei*. Pet. Br. (I) (Questions Presented). As the Court has repeatedly admonished, "this

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U.S.C. 1231(a)(1)(A)], and whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person.

[13] Further, the power to interdict aliens seeking to reach our shores is not in any way implicated by this decision. *See* Pet. Br. 27 (citing *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993)).

Court 'reviews judgments, not opinions.'" *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 626 (1986) (citations omitted).[14]

The Sixth Circuit's holding that, as a matter of textual consistency, Section 1231(a)(6) imposes a presumptive six-month limit on the post-removal-period detention of inadmissible aliens, Pet. App. 28a-38a, is entirely independent of any constitutional concerns the opinion expressed in its subsequent discussion. The court's discourse on *Mezei*'s scope and significance was wholly unnecessary to its dispositive statutory ruling. Thus, like the Ninth Circuit's decision in *Lin Guo Xi*, which reached the same statutory result, the Sixth Circuit's decision rests independently on a pure statutory analysis without regard to any potential constitutional problems that might be raised if the statute were interpreted differently. Pet. App. 31a-38a; *see Lin Guo Xi*, 298 F.3d at 836. The ongoing vitality and significance of *Mezei*'s due process holding is appropriately considered when and if it constitutes the basis for a ruling that will actually determine the outcome of a dispute between the litigants. That is not the case here.

4. The court of appeals correctly held that the language of Section 1231(a)(6) cannot be construed differently for inadmissible aliens like the respondents, who were stopped at the border before entering the country, and aliens like those in *Zadvydas*, who were ordered removed after entering the country. The government

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[14] The cases cited by the government are inapposite, Pet. Br. 28 n.7 (citing *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949), and *United States v. Title Ins. & Trust Co.*, 265 U.S. 472 (1924)), as they do not address the appropriate exercise of the Court's certiorari jurisdiction.

devotes most of its petition to arguing that the Sixth Circuit's statutory ruling is an improper "extension" of this Court's decision in *Zadvydas*. *E.g.*, Pet. Br. 21. But the court of appeals' decision reflects a straightforward application of *Zadvydas*'s statutory construction and the recognized principle that a statutory provision must be interpreted consistently. The government cites no authority for construing the language of a single phrase in the same statute differently depending on its application. Indeed, the government made this precise point when arguing in *Zadvydas* in support of its rejected interpretation of Section 1231(a)(6),[15] a point echoed by four dissenting Justices. *See Zadvydas*, 533 U.S. at 710 (Kennedy, J., dissenting) ("[I]t is not a plausible construction of Section 1231(a)(6) to imply a time limit as to one class but not to another. The text does not admit of this possibility."). Furthermore, as already noted, the government itself acknowledges that the presumptive six-month limit of Section 1231(a)(6) *does* apply to some "inadmissible" aliens, namely those who are apprehended after entering

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[15] Brief for the Petitioners at 47, *Ashcroft v. Ma*, 533 U.S. 678 (2001) (No. 00-38):

> [The Supreme] Court has long recognized that, when Congress uses the same language even in different parts of the same statute, it generally intends the language to have the same meaning. That rule is "at its most vigorous when a term is repeated within a given sentence." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). A fortiori here, where Congress enacted a single grant of authority to the Attorney General over several categories of aliens, *Congress must be understood to have intended the same language to confer the same authority with respect to each category*.

(emphasis added).

the country unlawfully. *See supra* pp. 4, 19. Thus, the government's reading would not only require the statute to be interpreted differently for deportable and inadmissible aliens but would also require the statute to be read differently depending on the type of "inadmissible" alien being detained.

The Sixth Circuit's reading of Section 1231(a)(6) gains further support when compared with Section 1226a, the USA PATRIOT Act provision that provides for detention of aliens certified as suspected terrorists. That provision specifically authorizes post-removal-period detention "for additional periods of up to six months." 8 U.S.C. 1226a(a)(6). However, detention under Section 1226a is authorized "only if the release of the alien will threaten the national security of the United States or the safety of the community or any person." *Id.* In contrast, Section 1231(a)(6) does *not* condition post-removal-period detention of inadmissible aliens on a finding of danger or flight risk. Thus, were the government correct that Section 1231(a)(6) imposes no limit on the post-final-order detention of inadmissible aliens stopped at the border, the result would be anomalous: the government would have greater authority to detain inadmissible aliens who are *not* suspected terrorists than inadmissible aliens who *are* suspected terrorists.

The court of appeals' constitutional analysis, although unnecessary to the outcome in this case, was also correct. As this Court emphasized in *Zadvydas*, "[t]he civil confinement here at issue is not limited, but potentially permanent." 533 U.S. at 691. "Moreover, the sole procedural protections available to the alien are found in the administrative proceedings, where the alien bears the burden of proving he is not dangerous, without (in the

Government's view) significant later judicial review." *Id.* at 692. "The serious constitutional problem arising out of a statute that, in these circumstances, permits an indefinite, perhaps permanent, deprivation of human liberty without any such protection is obvious." *Id.* These same concerns are present here. In the instant case, for example, respondent Carballo was incarcerated by the INS for nearly fifteen years; respondent Rosales for four years. This imprisonment was not as punishment for a crime, but "simply because their country of origin will not have them back." Pet. App. 48a.

The government notes that the court of appeals expressed "'vehement[]' disagreement" with the government's constitutional analysis. Pet. Br. 16 (quoting opinion). But that disagreement was only with respect to the government's assertion that the detention of an excludable alien does not even "*implicate* the Fifth Amendment.'" Pet. App. 40a (emphasis in opinion) (citing government's brief). Significantly, the court of appeals then proceeded to acknowledge that "excludable aliens *are* treated differently for due process purposes than deportable aliens: they are entitled to less process," Pet. App. 41a (emphasis in original), and that "excludable aliens do not have a constitutional right to enter or be admitted to the United States." Pet. App. 46a.

As this Court stressed in *Zadvydas*, the question "is not one of 'confer[ring] on those admitted the right to remain against the national will' or 'sufferance of aliens' who should be removed." 533 U.S. at 695 (citations and punctuation omitted). The question "is whether aliens that the Government finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States." *Id.* The court of appeals correctly concluded that, at a minimum, respondents' indefinite, potentially permanent

detention would raise serious constitutional concerns. Pet. App. 46a.

Finally, the court of appeals properly explained that the constitutional concerns raised by the potential lifelong detention of an alien stopped at the border are not eliminated by *Mezei*, as that case involved particular national security concerns not present here. Pet. App. 49a-50a. Further, the court of appeals correctly noted that *Mezei* must be read in light of this Court's subsequent due process detention decisions, upon which this Court expressly relied in *Zadvydas*. Pet. App. 51a (citing cases). Thus, as the court of appeals correctly reasoned, Section 1231 should be construed, if fairly possible, to avoid the substantial constitutional questions raised by the indefinite detention of aliens stopped at the border.[16]

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[16] In expressing its view on the constitutional issues raised by the indefinite detention of respondents, the Sixth Circuit did not have the benefit of this Court's subsequent decision in *Demore v. Kim*, __ U.S. __, 123 S. Ct. 1708 (2003), which upheld the constitutionality of a different immigration detention statute. In the event that the government were to argue that a remand in light of that later decision is warranted, respondents would respectfully seek an opportunity to respond.

CONCLUSION

For the reasons and upon the authorities cited above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

ADDITIONAL STATUTES INVOLVED

1. Section 303 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) provides in relevant part:

(b) Effective Date. –

. . . . .

(2) Notification regarding custody. – If the Attorney General, not later than 10 days after the date of the enactment of this Act, notifies in writing the Committees on the Judiciary of the House of Representatives and the Senate that there is insufficient detention space and Immigration and Naturalization Service personnel available to carry out section 236(c) of the Immigration and Nationality Act, as amended by subsection (a), or the amendments made by section 440(c) of Public Law 104-132, the provisions in paragraph (3) shall be in effect for a 1-year period beginning on the date of such notification, instead of such section or such amendments. The Attorney General may extend such 1-year period for an additional year if the Attorney General provides the same notice not later than 10 days before the end of the first 1-year period. After the end of such 1-year or 2-year periods, the provisions of such section 236(c) shall apply to individuals released after such periods.

(3) Transition period custody rules. –

(A) In general. – During the period in which this paragraph is in effect pursuant to paragraph (2), the Attorney General shall take into custody any alien who –

(i) has been convicted of an aggravated felony (as defined under section 101(a)(43) of the Immigration and Nationality Act, as amended by section 321 of this division),

(ii) is inadmissible by reason of having committed any offense covered in section 212(a)(2) of such Act,

(iii) is deportable by reason of having committed any offense covered in section 241(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of such Act (before redesignation under this subtitle), or

(iv) is inadmissible under section 212(a)(3)(B) of such Act or deportable under section 241(a)(4)(B) of such Act (before redesignation under this subtitle), when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(B) Release. – The Attorney General may release the alien only if the alien is an alien described in subparagraph (A)(ii) or (A)(iii) and –

(i) the alien was lawfully admitted to the United States and satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding, or

(ii) the alien was not lawfully admitted to the United States, cannot be removed because the designated country of removal will not accept the alien, and satisfies the Attorney General that the alien will not pose a danger to the safety of

other persons or of property and is likely to appear for any scheduled proceeding.

2. Section 309 of IIRIRA provides in relevant part:

(a) In General. – Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").

. . . . .

(c) Transition for Aliens in Proceedings. –

(1) General rule that new rules do not apply. – Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings before the title III-A effective date –

(A) the amendments made by this subtitle shall not apply, and

(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

(2) Attorney general option to elect to apply new procedures. – In a case described in paragraph (1) in which an evidentiary hearing under section 236 or 242 and 242B of the Immigration and Nationality Act has not commenced as of the title III-A effective date, the Attorney General may elect to proceed under chapter 4 of title II of such Act (as amended by this subtitle). The Attorney General shall provide notice of such election to the alien

involved not later than 30 days before the date any evidentiary hearing is commenced. If the Attorney General makes such election, the notice of hearing provided to the alien under section 235 or 242(a) of such Act shall be valid as if provided under section 239 of such Act (as amended by this subtitle) to confer jurisdiction on the immigration judge.

(3) Attorney general option to terminate and reinitiate proceedings. – In the case described in paragraph (1), the Attorney General may elect to terminate proceedings in which there has not been a final administrative decision and to reinitiate proceedings under chapter 4 of title II of the Immigration and Nationality Act (as amended by this subtitle). Any determination in the terminated proceeding shall not be binding in the reinitiated proceeding.

(4) Transitional changes in judicial review. – In the case in which a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act, notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act) to the contrary –

> (A) in the case of judicial review of a final order of exclusion, subsection (b) of such section shall not apply and the action for judicial review shall be governed by the provisions of subsections (a) and (c) of such in the same manner as they apply to judicial review of orders of deportation;

. . . . .

(d) Transitional References. – For purposes of carrying out the Immigration and Nationality Act, as amended by this title –

. . . . .

(2) any reference in law to an order of removal shall be deemed to include a reference to an order of exclusion and deportation or an order of deportation.

3. Former Section 1226(e) of Title 8 of the United States Code (1994) provides:

(e) Excludability.

(1) Pending a determination of excludability, the Attorney General shall take into custody any alien convicted of an aggravated felony upon release of the alien (regardless of whether or not such release is on parole, supervised release, or probation, and regardless of the possibility of rearrest or further confinement in respect of the same offense).

(2) Notwithstanding any other provision of this section, the Attorney General shall not release such felon from custody unless the Attorney General determines that the alien may not be deported because the condition described in section 243(g) exists.

(3) If the determination described in paragraph (2) has been made, the Attorney General may release such alien only after –

(A) a procedure for review of each request for relief under this subsection has been established,

(B) such procedure includes consideration of the severity of the felony committed by the alien, and

(C) the review concludes that the alien will not pose a danger to the safety of other persons or to property.